SUPREME COURT

STATE OF MICHIGAN
SUPREME COURT

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CHARLES SINGTON,

Plaintiff-Appellee,

vs.

DAIMLER CHRYSLER CORPORATION,

Defendant-Appellant.

Supreme Court No 119291

Court of Appeals No. 225847

LC WCAC No. 99 0110

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Amicus MTLA answers NO

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INTRODUCTION

In the January 4, 2002 Order granting leave to appeal, the Court invited interested groups to petition to file Amicus Curiae Briefs. In addition, the Court directed the parties to address:

1. Whether *Haske v Transport Leasing Inc*, 455 Mich 628 (1997) and *Powell v Casco Nelmor Corp*, 406 Mich 332 (1979) are reconcilable; and,

2. Whether *Haske* or *Powel* can be reconciled with disability determinations under MCL 418.301(4), and weekly wage loss benefits in light of subsequent reasonable employment under MCL 418.301(5) and MCL 418.301(9).

With respect to the latter, the question posed by the Court was whether a subsequent event might end entitlement to wage loss benefits by virtue of breaking the causal relationship between the work-related injury and the claimant's wage loss.

The Michigan Trial Lawyers Association (MTLA) submits this brief in an effort to address the questions posited by the Court.

STATEMENT OF FACTS

MTLA adopts the Statement of Facts as presented by the plaintiff in his brief.

LAW AND ARGUMENT

First, it is important to understand that *Haske* and *Powell* address two separate and distinct aspects of benefit determination.

Haske addresses the initial determination of "disability", which is defined in the controlling statute as "a limitation of an employee's wages earning capacity in work suitable to his or her qualifications and training." MCL 418.301(4) (emphasis added).

Powell addresses the questions of whether, once disability has been established, the performance of favored work results in a new wage earning capacity barring some or all of future weekly compensation benefits when the favored work ends; or whether an intervening event (outside of the employee's control), which precludes the continuation of favored work, acts as a legal bar to continued eligibility for some or all of future weekly workers' compensation benefits.

The defendant and its Amici have so confused the two concepts, while ignoring the plain meaning of the statute, that what is asked of the Court is to rewrite the statutory scheme in a manner specifically rejected by the Legislature.

1. Disability Exists when a Work Injury or Disease Limits the Ability of an Employee to Compete in Jobs within the Employee's qualifications and Training.

In 1987 the Michigan Legislature enacted 1987 PA 28, which amended the definition of general disability to read:

> As used in this chapter, "disability" means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss. MCL 418.301(4); MSA 17.237(301)(4).[1] (emphasis supplied)

A virtually identical provision appears at MCL 418.401(1); MSA 17.237.401(1), governing occupational diseases.

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[1] From the inception of the workers' disability compensation program in 1912 until 1982, there was no explicit statutory "definition of disability" and a common law definition was derived from the predecessor to the current provision at MCL 418.371(1); MSA 17.237(371)(1), which read:

> The weekly loss in wages referred to in this act shall consist of such percentage of the average weekly earnings of the injured employee, computed according to the provisions of this section, as shall fairly represent the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the accident, the same to be fixed as of the time of the accident, but to be determined in view of the nature and extent of the injury.1912 Mich. Pub. Acts No. 10, Part II, §11 (1st Extra Session) (emphasis supplied).

From 1982 until May 14, 1987, the statutory language read:

> As used in this chapter, "disability" means a limitation of an employee's wage earning capacity the employee's general field of employment resulting from a personal injury or work related disease. The establishment of a disability does not create a presumption of wage loss. MCL 418.301(4); MSA 17.237(301)(4) added by 1981 PA 200 , prior to amendment by 1987 PA 28 (emphasis supplied).

Since the inception of workers' compensation in Michigan, this Court has repeatedly held that disability is based on an injured employee's "capacity to earn in the same employment in which the employee was injured." *Foley v Detroit United Ry*, 190 Mich 507, 515; 157 NW 45 (1916) (emphasis supplied). This test remains intact with judicial and legislative refinement of what was meant by the word "employment," not, as defendant argues, change in the concept of "a limitation."

Any review of the history of the Michigan Act demonstrates a consistent conceptual framework of requiring a showing, first, of the existence of a work-related injury or disease; second, that the injury or disease resulted in an impairment or a limitation of the employee's earning capacity; and, finally, that the impairment exists within a defined field of employment before an employee can be deemed disabled.

Perhaps this is nowhere better exemplified than in this Court's decision in *Kaarto v Calumet & Hecla, Inc*, 367 Mich 128; 116 NW2d 225 (1962). Mr. Kaarto was a skilled mineworker. This Court summarized the facts thusly:

> Plaintiff was burned on the hands, and face as a result of an explosion in defendant's mine, where he was engaged in what both parties describe as skilled employment. Workmen's compensation benefits were paid to him voluntarily by defendant for a period of about 7 months while he recuperated from his injuries. Upon recovery, plaintiff returned to the mine and resumed his former duties, performing them satisfactorily and without significant discomfort. At the end of 14 months, defendant's mine was shut down for economic reasons and all its employees, including plaintiff, were laid off.
>
> Apparently regular mining employment is no longer available in the locality of plaintiff's residence, although he has worked on a few occasions at an adventure-type mine. Plaintiff concedes that his injuries do not impair his ability to perform his former mine employment and he says that he would return to such employment were it available to him. The only work available to plaintiff now is common labor, but plaintiff claims that his

> injuries limit him in performing such labor and, on that account, seeks workmen's compensation benefits. *Kaarto, supra,* 367 Mich 129-130.

Although Mr. Kaarto suffered a clear work-related impairment of earning capacity, the Court reversed the award of benefits because that impairment did not affect his ability to work in his previous, skilled employment field, stating:

> In the case at bar, the evidence is sufficient to support the appeal board's finding that this skilled worker's injuries impaired his wage-earning capacity as a common laborer. It is also clear from the record that there is no longer available regular employment requiring plaintiff's skills and plaintiff is thereby limited to employment as a common labor, in which labor his wage-earning capacity has been impaired by industrial injury. Had plaintiff been engaged in common labor at the time of injury, he would be entitled to compensation benefits because his injuries prevent him from doing some common labor. *Miller v. S. Fair & Sons*, 206 Mich 360; *Smith v. I. Stephenson Co.*, 212 Mich 154; and *Wiedland v. Dow Chemical Co.*, 334 Mich 427. However, because he would be able to perform his skilled mining work but for the economic conditions which closed the mine, he is barred by the statute from receiving compensation for his impaired earning capacity as a common laborer.
>
> Were there a way properly to affirm what the appeal board sought here to accomplish, we would affirm. The statutory language, however, bars the way to substantial justice for this plaintiff. We repeat what this Court said 47 years ago, in January of 1915, in *Hirschkorn v. Fiege Desk Co.*, supra, at p 242:
>
> > "The award made by the board was a very equitable one, and is one which would prefer to sustain, if we could do so without attempting to amend the law by judicial construction. It appears to be, however, an exigency which the law has not provided for. We think the relief in such cases lies with the legislature, rather than with the courts."
>
> *Kaarto, supra,* 367 Mich 131-132.

When the clear language of the act is analyzed in historical perspective, it is obvious that the sole change enacted by the legislature has been in the field of employment against which an employee's impaired or limited earning capacity is to be measured. Instead of looking to either the specific skilled work or the whole field of common labor, the field now encompasses those jobs or the kind of work for which the employee has qualifications and training. On its face and

through the incorporation of well-defined concepts and language, the statutory provisions continued the concept for disability determination long established by case law.

Within this framework, this Court in *Haske v Transport Leasing Inc*, 455 Mich 628; 566 NW2d 896, 908 (1997) held:

> "Total disability arises from an injury, i.e., "incapacity for work resulting from personal injury is total" under subsection 351(1), when an employee proves that he is unable to perform all work suitable to his qualifications and training as a result of his injury. A partial disability arises from an injury, i.e., "incapacity for work resulting from work is partial" under subsection 361(1), when an employee proves that his is unable to perform a single position within his qualifications and training."

Despite the plain language of the Act, defendant continues to argue that "a limitation" does not mean the plainly understood usage, but a total inability to perform work within an employee's qualifications and training. Thus, says defendant, if an injured employee has the ability to perform any job, whether or not available to the injured employee, that employee has no limitation in earning capacity.

Defendant's argument is not based on the plain language of the Act. It is not based on the historical conceptual framework of the Act. It is not based on the actual legislative history. It is not based on the description of the author of the language change.

To the contrary, defendant offers the ramblings of a speaker at a trade association, who was in no way involved in the development of the Michigan Act. (Defendant's Appendix at 58a-59a) It relies on floor statements made seven years before the passage of the legislation by a Senator who was not even

involved at the time of passage and to law review articles, which predated the passage of the legislation by six years. (Defendant's Brief at 25 –26). Defendant also relies on cases, which have absolutely no bearing whatsoever on the determination of disability.

For example, defendants cite a number of cases, almost all of which rely on *Pulley v Detroit Engineering & Machine Co,* 378 Mich 418, 423; 144 NW2d 40 (1966) for the proposition that "wage earning capacity" is a "complex of fact issues concerned with the nature of the work performed, and the continuing availability of work of that kind, and the nature and extent of the disability, and the wages earned [subsequent to the injury]." But defendant does not tell this Court that those cases are dealing with the question of whether subsequent employment creates a new wage earning capacity, not an initial determination of disability.

The interpretation urged by defendant violates the basic principle of statutory construction that must look to the plain meaning of the language employed by the legislature and give meaning to that language. Such clear language must be enforced as written:

> If the language used is clear, then the Legislature must have intended the meaning it has plainly expressed, and the statute must be enforced as written. *Hiltz v Phil's Quality Market*, 417 Mich 335, 343; 337 NW2d 237 (1983).

Moreover, adoption of a word or phrase having a settled meaning at common law is construed as an acceptance of that meaning. 2A Sands, Sutherland Statutory Construction (3d ed) sec 50.03, pp 277-278; *Thomas v State Highway Dep't*, 398

Mich 1, 9-10; 247 NW2d (1976). In that regard, the amendments which took effect in 1982 require only a showing of "a limitation of wage earning capacity..."[2] Moreover, there was absolutely no change in this conceptual framework when the 1987 amendments were adopted. The legislature retained the well-defined phraseology, "a limitation ... of wage earning capacity...."

Given the plain meaning of the language used by the legislature, there should be no need for further inquiry. However, understanding the genesis of the language and the intent of the authors provides further insight into understanding the evolutionary nature of the statutory definition.

Michael Gillman, then the chairperson of the appeal board, who authored the definition language in 1981[3], indicated that the 1981 amendments did not alter, but essentially codified the common law definition. Gillman, Michael J., *The Rise and Fall of Reasonableness: Favored Employment in Michigan Workers' Compensation*, 1 Cooley LJ 177, 205-206 (1982). See also, Welch, Edward M. Jr., *Reformed Again: Workers' Compensation in Michigan*, Mich BJ, June, 1982, at 436, 438-439.

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[2] Lest there be any question of the meaning of the use of "a" as a qualifier, Black's Law Dictionary (6th ed) defines "a" as follows:

> "The word 'a' has varying meanings and uses. 'A' means 'one' or 'any,' but less emphatically than either. It may mean one where only one is intended, or it may mean any one of a greater number. It is placed before nouns of the singular number, denoting an individual object or quality individualized." *Id*, at 1.

Consequently, the Legislature's requirement merely of "a limitation" means "one" or "any" limitation, and not complete and total inability to work. When used in a statute, words are to be given their common meaning, *Fuller Central Park Properties* v *Birmingham*, 97 Mich App 517, 524; 296 NW2d 88 (1980), and reference to a dictionary to determine that meaning is entirely appropriate. *Dep't of Treasury* v *Psychological Resources, Inc*, 147 Mich App 140, 145; 383 NW2d 144 (1985).

[3] Welch, Edward M., *Workers' Compensation in Michigan: Law & Practice* (Revised Edition), §8.9, p 8-9.

Similarly, Professor Theodore St. Antoine, the author of the changes enacted in 1987, believed they would be of "small practical consequence." Professor St. Antoine issued a report in late 1984 in which he first described the commonly understood historical concept of disability in Michigan:

> The most important point to be gleaned from all this analysis is that in a wage-loss system, such as Michigan's, once "disability" is established, the extent of disability makes little or no difference. As long as the disability continues, however slight it may seem in terms of physical impairment, full compensation benefits will at least theoretically be due from the employer. Inability to earn wages in fact will presumptively be the measure of the loss of wage earning capacity. Whether an employee is technically "totally disabled" or "partially disabled" is unimportant as a practical matter. In either case he or she will receive full benefits under Michigan law if substitute employment is not proffered. St. Antoine, Workers' Compensation in Michigan: Costs, Benefits, and Fairness (1984), at 26 (emphasis in original). (5)

Professor St. Antoine then went on to propose the change that ultimately became the law in this state, writing:

> If I could write on a clean slate, I would prefer to see the Michigan definition brought even closer into the mainstream of American law by declaring that "disability" means a "limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease." That would simply substitute Professor Larson's classic formulation of "work suitable to claimant's qualifications and training" for the "employee's general field of employment" as contained in Public Act 200 of 1981. At least that might serve to reassure those who believe that the State's definition of "disability" is a major flaw in our compensation system. But it would probably be of small practical consequence * * *
>
> The only way to have a dramatic impact upon eligibility for wage loss benefits by a change in the definition of "disability" would appear to be through the adoption of the sort of extremely strict definition employed in the Social Security disability determinations. There it is provided that
>
> an individual...shall be determined under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. 42 U.S.C. 423(d)(2)(A).
>
> But that definition was designed for a program whose purpose was to provide benefits for injured workers expected to die or remain disabled for at least twelve months; its harshness is totally inconsistent with the conception of disability under the workers' compensation laws of this

> country generally; and I cite it only to indicate the lengths to which one would have to go to impose significant further limitations on eligibility for benefits under a wage loss system simply through a redefinition of "disability." St. Antoine, at 27-28. (6-7) (emphsis supplied)

Of course, this is precisely the language that was ultimately enacted. 1987 PA 28; MCL 418.301(4); MSA 17.237(301)(4).

Nor can there be any doubt that the 1987 amendment was taken directly from Professor St. Antoine's report. This report was widely circulated and consulted prior to the taking of any action by the Legislature. In fact, it was expressly referred to in the debates on the bill, as the excerpts from those debates reprinted below make clear. For example, Representative Perry Bullard, Chair of the House Judiciary Committee and Member of the House Labor Committee, characterized his understanding as to the source of the amendment as follows:

> The legislature, the executive office, business and labor have spent nearly six years developing what I hope is the final definition of disability. **We used the 1984 St. Antoine report as a basis for discussion and adopted his language in the amendments passed today**. Journal of the House, 84th Leg, Reg Sess 1987, No 41 (May 7, 1987), at 1067-1068 (emphasis supplied). (15)

Similarly, Senator John Cherry, a member of the Senate Committee on Human Resources and the House/Senate Conference Committee on SB 67, remarked on final passage as to his own understanding as to the source for the disability standard incorporated in the bill:

> To permit the definition of disability to expire for a second time due to partisan politics would once again exhibit callous irresponsibility both to business and workers in Michigan. **The definition in the Conference Report and the legislation we have considered to date contains the St. Antoine Clean Slate language**. Journal of the Senate, 84th Leg, Reg Sess 1987, No 46 (May 14, 1987) at 1234-1235 (emphasis supplied). (18).

This type of debate and analysis is fully relevant in determining the intent of the legislature:

> "Courts may look to the legislative history of an act to ascertain the meaning of its provisions. *People* v *Hall*, 391 Mich 175, 191; 215 NW2d 166 (1974); *Great Lakes Steel* v *Dep't of Labor*, 191 Mich App 323; 477 NW2d 124 (1991). A court may consider journals chronicling legislative

> history, and the changes in the bill during its passage. *Kizer* v *Livingston Co Bd of Comm'rs*, 38 Mich App 239, 246-247; 195 NW2d 884 (1972)." *Dep't of Transportation* v *Thrasher*, 196 Mich App 320, 323; 493 NW2d 457 (1992).

This analysis, as well as the precise language used, undeniably establishes Professor St. Antoine's report as the basis for the "definition of disability" ultimately enacted.

However, Professor St. Antoine never in his wildest dreams envisioned the type of construction the standard he proposed has since received[4]. The professor believed the change to be of "small practical consequence." .

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[4] Ironically, the very standard expressly rejected by Professor St. Antoine is once again urged upon this Court by defendant. In this regard, Professor St. Antoine revisited the controversy caused by his proposal and the resulting 1987 amendment. He offered the following insight:

> As I said in my Report, the effect of the change would be to substitute Larson's formulation, "work suitable to the claimant's qualifications and training," for the 1981 language referring to the "employee's general field of employment." The difference was to shift attention away from the kind of work an employee was in fact doing to the kind of work the employee was qualified to do. But there was no change, proposed or enacted, in the preexisting language of Section 418.301(4) that "disability" meant "*A LIMITATION* of an employee's wage earning capacity..." (bolding in original, underscoring supplied) St. Antoine, Theodore, *Defining Disability: The Approach to Follow*, 3 Welch on Workers' Comp (May 1993), at 59. (23).

Professor St. Antoine further wrote:

> Speaking generally, Larson observes: "It is uniformly held..., without regard to statutory variations in the phrasing of the test, that a finding of disability may stand even when there is evidence of some actual post-injury earnings equaling or exceeding those received before the accident." Larson, supra, 57.21(c), p. 10-136. This analysis is wholly in keeping with the plain wording of Section 418.301(4), which speaks of disability as "a" limitation on wage earning capacity, not as the total elimination of that capacity.
>
> Thus, it should follow that if an employee is qualified to do three jobs, and a work-related injury prevents her from doing one of them, she has a "disability," even though she remains quite capable of performing the other two. Id. at 60 (24) (emphasis supplied).

Professor St. Antoine once more offered a caution that the interpretation of the standard of disability "ought not to turn on the accident of political partisanship." *Id.* at 60 (16b).

No one suggested otherwise at any time during the legislative process. For example, when the language change was first proposed in 1985, Jurgen Skoppek, then a legislative aid, and now chair person of the Workers' Compensation Appellate Commission outlined the meaning of the change in a memo to the Senate Republican Caucus:

> "Both sections now utilize the existing 301 definition, whereby a person may recover benefits if his or her 'wage earning capacity' has been impaired. The concept is very simple: If you make less money because of an injury or work caused disease, you are disabled (with the language about making up your loss with another job retained from the 1981 reforms." (23)

The Senate Committee Chair, Fred Dillingham, and the Senate floor leader, Senator Degrow, both indicated that the principle concerns of the Senate had been to overrule this Court's decision in *Beauchamp v Dow Chemical Co*, 427 Mich 1; 398 NW2d 882 (1986). Both also echoed the sentiments of Senator Cherry that the elimination of the sunset provision would end the interminable revisitation of workers' compensation. (17, 19-20)

It should further be noted that a proposal was made to enact an entirely different standard, one, which is frighteningly similar to that now being urged by the defendant. This proposal, offered by the business representatives to the "Governor's Action Group," would have retained the "general field of employment" definition for a year, after which it would have had Michigan adopt the "Louisiana definition." This standard defined "disability" as an inability to engage in <u>any</u> work activity:

> "For injury producing temporary total disability of an employee to engage in any self-employment or gainful occupation for wages whether or not the same or a similar occupation as that is [sic] which the employee was customarily engaged when injured and whether or not an occupation for which the employee at the time of injury was particularly fitted by reason of education, training, or experience." (25-27)

Nothing even remotely resembling this proposal was enacted into law in Michigan. In fact, the proposal was never formally offered as an amendment, and died for lack of a sponsor. There were efforts to change the focus of the Michigan "definition of disability" from an impairment or limitation of a claimant's wage earning capacity to a requirement of complete inability to work, but they were not successful. In fact, while business interests insisted upon the enactment of their *Beauchamp* intentional tort proposal nearly verbatim, the disability issue was given up or compromised. This Court should not resuscitate a failed proposal when the Legislature has expressly enacted a contrary provision.

It might be easier to discuss the conceptual framework by looking at a typical workers' compensation claim. Amicus does not offer a ludicrous example that has never happened, will never happen and probably could never happen, as did the Chambers of Commerce, but instead a more typical, run of the mill work injury claim.

Assume an employee who is a general laborer in a plant. The employee has performed a number of different jobs including assembly, press operation, machine tending, but for the past several months has been hanging parts, weighing 20 to 25 pounds on an overhead line. While performing this job, the employee suffers a sharp pain in the shoulder and is escorted to first aid where he is referred to an orthopedic surgeon.

After performing an examination and securing confirmatory tests, the surgeon determines that there is a torn rotator cuff and recommends surgical repair. The surgery is performed and the employee is placed on restrictions of no use of the affected extremity for a period of twelve weeks.

Is that employee disabled? Amicus suggests that everyone would agree that the employee is totally disabled from performing any of the work within his qualifications and training due to a work related injury, because all of his previous employment required the use of two hands.

Suppose after the twelve week recovery period, the surgeon places restrictions of no overhead lifting, no lifting of greater than 15 to 20 pounds on a regular basis and no pushing or pulling at or above chest level of weights in excess of 15 to 20 pounds. These restrictions are partially because of the damage already done to the shoulder and partially to prevent further damage to the weakened shoulder (prophylactic). Clearly, the employee would not be totally disabled, because the employee could perform some of the line jobs, some, if not all, of the machine tending jobs and some of the press jobs. Under the holding in *Haske* the employee is partially disabled. Under the standard urged by defendant, the employee would not be disabled because of the ability to earn the same wages post injury as pre injury within his qualifications and training[5].

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[5] Despite its protestations, defendant essentially urges the adoption of the retiree standard. While defendant differentiates the retiree standard because it uses the language "experience" as well as "qualifications and training," it ignores the operative provisions of that section of the Act. MCL 418.373; MSA 17.237(373) requires a showing "that the employee **is unable**, because of a work related disability, **to perform work** suitable to the employee's qualifications, including training or experience. **This standard of disability supercedes other applicable standards used to determine disability under either this chapter or chapter.** (cont'd next page)

In fact, that employee has "a limitation of" "wage earning capacity." The employee can no longer compete with other able bodied workers within his qualifications and training. A disability occurs under the plain language of the statute when a work related injury or disease limits the ability of an employee to perform the jobs for which the employee is qualified and trained. This concept of earning capacity is not unique to workers' compensation. Earning capacity is not measured in actual wages but in what could have been earned but for the injury. *Prince v Lott*, 369 Mich 606; 120 NW2d 780 (1963).

This is demonstrated in other sections of the Act as well. For example, MCL 418.356; MSA 17.237(356) recognizes that the earning capacity of an individual may increase. Accordingly, it allows for an increase in benefits for lower wage earners who can demonstrate that their earning capacity would increase. Likewise, MCL 418.301(9); MSA 17.237(301)(9) recognizes that a disabled employee, one who suffers "**a limitation**" of earning capacity can still perform work within the employee's qualifications and training. Thus, reasonable employment is defined not only as work within, but also work outside of the employee's qualifications and training.

Once the disability is established, the question is whether the employee is entitled to weekly wage loss benefits. The Act is clear, "the establishment of

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(fn 5 cont'd from previous page)
The language "**unable to perform**" has to be contrasted to the chapter 3 and chapter 4 language, which requires only a showing of "**a limitation**." Defendant misleads the Court by concentrating on the filed of employment in which the disability exists rather than the nature of the limitation of earning capacity. General liability requires the showing of "**a limitation**" while retiree benefits necessitate a showing of a total limitation of earning capacity.

disability does not create a presumption of wage loss." This provision differentiates general disability from specific loss and total and permanent disability as defined in MCL 418.361(2) &(3); MSA 17.237(361)(2) & (3).

Under those provisions weekly benefits are payable irrespective of the actual loss of wages. Thus, an employee can be returned to restricted work and will still receive full benefits for the specified period. The payments are for either anatomical loss or industrial loss of use and not for loss of earning capacity or actual loss of wages.

The determination of disability does not include a determination of wage loss. It is a question of whether a work related injury or disease creates **a limitation** of the employee's ability to earn wages, i.e. the employee's "wage earning capacity. The treatment of benefit eligibility is dealt with in other sections of the Act, not in section 301(4).

If the disability is total, benefits are paid in accordance with MCL 418.351; MSA 17.237(351), when disability is partial MCL 418.301(5); MSA 17.237(301)(5) and MCL 418.361(1); MSA 17.237(361)(1) govern the payment of benefits.

As a general rule when an employee suffers an injury and can no longer perform the employee's usual work full benefits are paid based on the actual loss of wages. Over the course of the history of the Act the issue of continued entitlement to benefits arises when a disabled employee has performed substitute work and that work is no longer available. Then the courts have had to deal with the complex factors described by the defendant. Was the work

favored, was it regular, did the employee establish a new wage earning capacity, was the employee at fault or was the cessation of work not the employee's fault.

These are not, and never have been, questions addressed in determining initial disability[6]. They are questions addressed once a determination of disability has been made.

If the hypothetical individual discussed above, after being released with the outlined restrictions, is not returned to work, because the employer is unable to offer work within the restrictions, is the employee entitled to benefits? Yes, the employee remains disabled because of the limitation of wage earning capacity demonstrated by the inability to perform work within the employee's qualifications and training. Under section 361(1) the employee is entitled to full benefits because the actual wage loss is total[7].

2. THE WORKERS' DISABILITY COMPENSATION ACT ADDRESSES SPECIFICALLY THE MANNER IN WHICH SUBSEQUENT EMPLOYMENT HAS BEEN PERFORMED AND TERMINATED.

Powell v Casco Nelmor Corp, 406 Mich 332 (1979) dealt with the treatment of loss of employment after the performance of favored work. The

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[6] Of course to receive benefits the wage loss has to be connected to the disability at the initial determination. Ad the *Haske* Court noted if the defendant establishes malingering, no benefits would be payable since there would be no disability. Moreover, a person can have a personal injury without disability entitling the employee only to medical benefits under MCL 418.315; MSA 17.237(315). Again, if that person leaves work due to an unrelated illness, because of a lay-off or any other circumstance, the employee was never disabled and is not entitled to benefits.

[7] Defendant would and has argued no. First, the employee does not meet its test of disability as the employee can still perform a number of jobs within the defined qualifications and training. Additionally, the defendant would require review of the reasons that the employee was not returned to employment. Thus, if it was because of seniority rules contained in a union contract, no benefits would be payable because the wage loss was unrelated to the disability. See, e.g., *Bonner v Chrysler Corp*, S Ct No 117206.

Court addressed the distinction between the determination of disability and the subsequent performance of favored work and loss thereof:

> "In sum, the fundamental posture of this case is that: (1) plaintiff has established her right to compensation for the work-related hand injury and (2) that right is neither barred by her subsequent favored work wages nor her later inability to continue such favored work because a (sic) supervening event not in her control." Powell at 279 NW2d 777.

In it's January 4, 2002 Order this Court asked whether *Powell* and *Haske* could be reconciled. They can because they deal with two separate and distinct determinations. *Haske* governs the initial determination of disability and entitlement to benefits, and *Powell* addresses the entitlement to benefits when there has been subsequent employment.

In *Powell* the Court addressed three fundamental legal principles, which guided its decision:

> "The first, and perhaps most important, is that the WCAB in finding that plaintiff was capable of performing only favored work had conclusive established plaintiff's disability and right to compensation. Significantly, this right persists unless cut off by a legal bar. The second legal proposition is that only wages from regular employment create a legal bar; wages from favored work, when actually paid, toll the right to compensation but when no longer paid neither toll nor bar compensation. The third legal proposition is that the inability to continue favored work, where that inability arises from a supervening event for which the worker is not responsible, does not create a legal bar.

At the time *Powell* was decided, the favored work doctrine was a judicial creation designed to mitigate the employer's liability for payment of compensation benefits. Subsequently, the concept of favored work and the treatment of entitlement to benefits have been codified, with modification, in both chapters 3 and 4 of the Act. MCL 418.301(5); MSA 17.237(301)(5) addresses the numerous issues previously relegated solely to judicial interpretation:

If disability is established pursuant to subsection (4), entitlement to weekly wage loss benefits shall be determined pursuant to this section and as follows:

(a) If an employee receives a bona fide offer of reasonable employment from the previous employer, another employer, or through the Michigan employment security commission and the employee refuses that employment without good and reasonable cause, the employee shall be considered to have voluntarily removed himself or herself from the work force and is no longer entitled to any wage loss benefits under this act during the period of such refusal.

(b) If an employee is employed and the average weekly wage of the employee is less than that which the employee received before the date of injury, the employee shall receive weekly benefits under this act equal to 80% of the difference between the injured employee's after-tax weekly wage before the date of injury and the after-tax weekly wage which the injured employee is able to earn after the date of injury, but not more than the maximum weekly rate of compensation, as determined under section 355.

(c) If an employee is employed and the average weekly wage of the employee is equal to or more than the average weekly wage the employee received before the date of injury, the employee is not entitled to any wage loss benefits under this act for the duration of such employment.

(d) If the employee, after having been employed pursuant to this subsection for 100 weeks or more loses his or her job through no fault of the employee, the employee shall receive compensation under this act pursuant to the following:

(i) If after exhaustion of unemployment benefit eligibility of an employee, a worker's compensation magistrate or hearing referee, as applicable, determines for any employee covered under this subdivision, that the employments since the time of injury have not established a new wage earning capacity, the employee shall receive compensation based upon his or her wage at the original date of injury. There is a presumption of wage earning capacity established for employments totalling (sic) 250 weeks or more.

(ii) The employee must still be disabled as determined pursuant to subsection (4). If the employee is still disabled, he or she shall be entitled to wage loss benefits based on the difference between the normal and customary wages paid to those persons performing the same or similar employment, as determined at the time of termination of the employment of the employee, and the wages paid at the time of the injury.

(iii) If the employee becomes reemployed and the employee is still disabled, he or she shall then receive wage loss benefits as provided in subdivision (b).

> (e) If the employee, after having been employed pursuant to this subsection for less than 100 weeks loses his or her job for whatever reason[8], the employee shall receive compensation based upon his or her wage at the original date of injury.

MCL 418.301(9); MSA 17.237(301)(9) then defines "reasonable employment" the term substituted for "favored work:"

> "Reasonable employment", as used in this section means work that is within the employee's capacity to perform that poses no clear and proximate threat to that employee's health and safety, and that is within a reasonable distance from that employee's residence. The employee's capacity to perform shall not be limited to jobs in work suitable to his or her qualifications and training."

The concepts articulated by the *Powell* Court are continued in the legislation, but they are limited.

Reasonable employment now defines favored work as any work within the employee's capacity to perform whether regular or make work, whether within the employee's qualifications and training or not. During the first one hundred weeks of performing the reasonable employment loss of that employment, for whatever reason under chapter 3, through no fault of the employee under chapter 4, automatically triggers the resumption of full benefits. Thus, lay offs, plant closings, subsequent illnesses that take the favored work out of the employee's capacity to perform, and other intervening events do not act as a legal bar to resumption of benefits. The complex factors urged by defendant are not at all in play if the loss of reasonable employment is within the first one hundred weeks.

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[8] The occupational disease version of this provision includes only jobs lost "through no fault of the employee..." MCL 418.401(3)(e); MSA 17.237(401)(3)(e).

When the employee has worked for more than one hundred weeks[9], the entitlement to continued benefits is governed by the same legal principles adopted by the Court in determining whether or not the employee has established a new wage earning capacity. Under both chapter 3 and chapter 4 the loss of reasonable employment after one hundred weeks must be through no fault of the employee. The magistrate must wrestle with all of the questions addressed in the cases cited by defendant to determine the basis for leaving work, and whether the work performed created a new wage earning capacity. It is only at this point that the capacity to perform work, the nature of the work performed, the duration of the work performed and the number of jobs the employee can perform come into play. Thus, a finding of performance of regular work with regular conditions of permanency may well establish a new wage earning capacity, but that determination remains a complex factual determination.

However, a subsequent illness or other factors not in the control of the employee still do not act as a bar to benefit entitlement. If the loss of the employment is through no fault of the employee, the reason for the loss cannot be a bar to further compensation.

If no earning capacity is created by the reasonable employment, then the employee is entitled to resumption of full benefits. If the employee is found to have established a new wage earning capacity, any benefit entitlement is limited

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[9] If the reasonable employment has been performed for over five hundred weeks, the employee is presumed to have established a new earning capacity.

to a differential between the wages at the time of injury and customary and usual wages at the time of termination of the reasonable employment.

The latter provision found in subsection (5)(d)(ii) demonstrates that the defendant's argument has absolutely no basis in the law. Even if an employee has performed reasonable employment for a number of years, and even if that employee has established a new wage earning capacity through the performance of that work, the employee remains entitled to a differential payment of benefits. Yet, defendant argues that the mere ability to perform some work within the employee's qualifications and training should act as a bar to collecting any compensation.

Defendant is attempting to resurrect a long-standing position that the theoretical ability to perform work should bar the receipt of compensation. This position has been advanced since the inception of the workers' compensation law in Michigan. It has been rejected as a basis for precluding the receipt of benefits.

In 1913 the industrial accident board addressed the partially disabled employee who retains the ability to perform some suitable work:

> "An employee who is recovering from an injury, and who has recovered so far that the disability is only partial, **cannot reasonably be required in his partially disabled condition to go among strangers looking for work.** Such requirement would not be reasonable, and the probabilities of his obtaining work if required to so seek it would be very remote. On the other hand if his employer has work suitable for him to perform in his partially disabled condition, and which he can do without suffering or inconvenience, and offers to give him such work, then it is the duty of such employee to accept the work tendered and thereby reduce the liability for compensation. **That if the employer has no suitable work, or having such work fails to tender it to the injured employee, the compensation cannot be reduced upon the theory that there are classes of work which he is able to do and which the might obtain**

> **perhaps, if he diligently sought for it, and which on the other hand he might not be able to obtain at all.**

Industrial Accident Bd, State of Mich, Bull. No. 3 at 10 (Dec. 1913) (emphasis added).

The argument now advanced by the defendant didn't make any sense in 1913, when the act was more stringent in its eligibility than now (e.g. there had to be an accidental injury, occupational disease was not covered, etc.) and it makes no sense at the present time. The legislature has rejected the position advanced by the enactment of the reasonable employment provisions. First, it has defined disability as "**a limitation**" of wage earning capacity. It did not define disability as a total limitation of wage earning capacity. Secondly, the legislature has specifically stated that the loss of reasonable employment for what ever reason (chapter 3 during first 100 weeks), or through no fault of the employee (chapter 4 at any time, chapter 3 after 100 weeks) is not a bar to recovery of benefits.

The mere fact that an employee is performing a regular plant job does not take it out of the definition of reasonable employment. Reasonable employment includes work within the plaintiff's qualifications and training by definition. Once the employee has demonstrated a disability and is restricted in performing some work within his qualifications and training, the employee is and remains disabled so long as a limitation continues. The question to be addressed under the statutory framework is not whether the employee retains the capacity to perform regular work within the employee's qualification and training, but whether the

performance of subsequent work for a period in excess of one hundred weeks has established a new earning capacity.

CONCLUSION

MTLA submits that *Haske* and *Powell* are not at odds. They deal with distinctly different determinations to be made under the Act. The former relates to the determination of disability under section 301(4) while the latter addresses the effect of loss of subsequent favored work now addressed in section 301(5).

The conceptual framework of *Powell* remains intact albeit limited by time. During the first one hundred weeks, the performance of reasonable employment (favored work) cannot create a new wage earning capacity. After one hundred weeks the determination of creation of a new wage earning capacity is a factual determination for the magistrate. A loss of reasonable employment (favored work) through no fault of the employee, or for whatever reason during the first one hundred weeks under chapter 3, is still not a legal bar to recovery at any time.

Thus, if an employee has a disability, i.e. "**a limitation**" of wage earning capacity, which is the inability to perform some of the work in the employee's qualifications and training, and loses subsequent employment for a reason unrelated to the work injury, and has not established a new wage earning

capacity the employee is entitled to the full restoration of benefits. The Act is explicit in this regard.

Respectfully Submitted,

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